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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

Docket No. 120307157-2434-02

RIN 0648-BB74

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Coastal Commercial Fireworks Displays at Monterey Bay National Marine Sanctuary, CA

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS, upon request of the Monterey Bay National Marine Sanctuary (MBNMS), hereby issues regulations pursuant to the Marine Mammal Protection Act (MMPA) to govern the unintentional taking of marine mammals, by harassment, incidental to authorizing professional fireworks displays within the MBNMS in California waters, for the period of July 4, 2012, through July 3, 2017. These regulations, which allow for the issuance of Letters of Authorization for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

DATES: Effective from June 28, 2012, through June 28, 2017.

ADDRESSES: A copy of MBNMS's application may be obtained by writing to Tammy C. Adams, Acting Chief, Permits and Conservation Division, Office of Protected Resources,

NMFS, 1315 East-West Highway, Silver Spring, MD 20910, or visiting the internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>. Documents cited in this final rule may also be viewed, by appointment, during regular business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 et seq.) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ‘negligible impact’ in 50 CFR 216.103 as “...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.”

Except with respect to certain activities not pertinent here, the MMPA defines ‘harassment’ as: “any act of pursuit, torment, or annoyance which (i) has the potential to injure a

marine mammal or marine mammal stock in the wild [“Level A harassment”]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [“Level B harassment”].”

Summary of Request

On April 28, 2011, NMFS received a complete application from MBNMS requesting authorization for take of two species of marine mammals incidental to coastal fireworks displays conducted at MBNMS under authorizations issued by MBNMS. NMFS first issued an incidental harassment authorization (IHA) under section 101(a)(5)(D) of the MMPA to MBNMS on July 4, 2005 (70 FR 39235; July 7, 2005), and subsequently issued 5-year regulations governing the annual issuance of Letters of Authorization (LOAs) under section 101(a)(5)(A) of the MMPA (71 FR 40928; July 19, 2006). Upon expiration of those regulations, NMFS issued MBNMS an IHA (76 FR 29196; May 20, 2011), which expires on July 3, 2012. During the effective period of this final rule (July 4, 2012 until July 3, 2017), MBNMS may authorize as many as 20 fireworks displays in designated areas per year and, as a result, marine mammals will be exposed to elevated levels of sound as well as increased human activity associated with those displays. Because the specified activities have the potential to take marine mammals present within the action area, MBNMS may be authorized to take, by Level B harassment only, California sea lions (*Zalophus californianus*) and harbor seals (*Phoca vitulina*).

Background

The MBNMS adjoins 276 mi (444 km), or approximately 25 percent, of the central California coastline, and encompasses ocean waters from mean high tide to an average of 25 mi (40 km) offshore between Rocky Point in Marin County and Cambria in San Luis Obispo

County. Fireworks displays have been conducted over current MBNMS waters for many years as part of national and community celebrations (e.g., Independence Day, municipal anniversaries), and to foster public use and enjoyment of the marine environment. In central California, marine venues are the preferred setting for fireworks in order to optimize public access and avoid the fire hazard associated with terrestrial display sites. Many fireworks displays occur at the height of the dry season in central California, when area vegetation is particularly prone to ignition from sparks or embers.

In 1992, the MBNMS was the first national marine sanctuary (NMS) to be designated along urban shorelines and therefore has addressed many regulatory issues previously not encountered by the NMS program. Authorization of professional fireworks displays has required a steady refinement of policies and procedures related to this activity. Fireworks displays, and the attendant increase in human activity, are known to result in the behavioral disturbance of pinnipeds, typically in the form of temporary abandonment of haul-outs. As a result, pinnipeds hauled out in the vicinity of authorized fireworks displays may exhibit behavioral responses that indicate incidental take by Level B harassment under the MMPA. Numbers of California sea lions and harbor seals, the species that may be subject to harassment, have been recorded extensively at four regions where fireworks displays are authorized in MBNMS. Based on these data and MBNMS's estimated maximum number of fireworks displays, MBNMS may be authorized to incidentally harass up to 4,219 California sea lions and 230 harbor seals annually over the 5-year time span of this final rule, from July 4, 2012, to July 3, 2017.

Description of the Specified Activity

Since 1993, the MBNMS, a component of NOAA's Office of National Marine Sanctuaries, has processed requests for the professional display of fireworks that affect MBNMS.

The MBNMS has determined that debris fallout (i.e., spent pyrotechnic materials) from fireworks events may constitute a discharge into the sanctuary and thus violate sanctuary regulations, unless an authorization is issued by the superintendent. Therefore, sponsors of fireworks displays conducted in the MBNMS are required to obtain sanctuary authorization prior to conducting such displays (see 15 CFR 922.132).

Professional pyrotechnic devices used in fireworks displays can be grouped into three general categories: aerial shells (paper and cardboard spheres or cylinders ranging from 2-12 in (5-30 cm) diameter and filled with incendiary materials), low-level comet and multi-shot devices similar to over-the-counter fireworks (e.g., roman candles), and ground-mounted set piece displays that are mostly static in nature. Fireworks displays were described in detail in the Federal Register notice announcing the proposed rule (77 FR 19976; April 3, 2012); please see that document for more information.

The MBNMS issued 91 authorizations for professional fireworks displays from 1993-2011. However, the MBNMS staff projects that as many as twenty coastal displays per year may be conducted in, or adjacent to, MBNMS boundaries in the future. Thus, the number of displays will be limited to not more than twenty events per year in four specific areas along 276 mi (444 km) of coastline. Fireworks displays will not exceed 30 minutes (with the exception of up to two displays per year, each not to exceed 1 hour) in duration and will occur with an average frequency of less than or equal to once every 2 months within each of the four prescribed display areas. NMFS believes – and extensive monitoring data indicates – that incidental take resulting from fireworks displays will be, at most, the short-term flushing and evacuation of non-breeding haul-out sites by California sea lions and harbor seals.

A more detailed description of the fireworks displays authorized by MBNMS may be found in MBNMS' application, in MBNMS' Assessment of Pyrotechnic Displays and Impacts within the MBNMS 1993-2001 (2001), or in the report of Marine Mammal Acoustic and Behavioral Monitoring for the MBNMS Fireworks Display, 4 July 2007 (2007), which are available at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>.

Description of Fireworks Display Areas

The Monterey Bay area is located in the Oregonian province subdivision of the Eastern Pacific Boreal Region. The six types of habitats found in the bay area are: (1) submarine canyon habitat, (2) nearshore sublittoral habitat, (3) rocky intertidal habitat, (4) sandy beach intertidal habitat, (5) kelp forest habitat, and (6) estuarine/slough habitat. Monterey Bay supports a wide array of temperate cold-water species with occasional influxes of warm-water species, and this species diversity is directly related to the diversity of habitats.

Pyrotechnic displays within the sanctuary are conducted from a variety of coastal launch sites (e.g., beaches, bluff tops, piers, offshore barges, golf courses). Authorized fireworks displays will be confined to only four general prescribed areas (with seven total sub-sites) within the sanctuary, while displays along the remaining 95 percent of sanctuary coastal waters will be prohibited. These sites were approved for fireworks events based on their proximity to urban areas and pre-existing high human use patterns, seasonal considerations such as the abundance and distribution of marine wildlife, and the acclimation of wildlife to human activities and elevated ambient noise levels in the area.

The four conditional display areas are located, from north to south, at Half Moon Bay, the Santa Cruz/Soquel area, the northeastern Monterey Peninsula, and Cambria (Santa Rosa Creek) (see Maps A-J in MBNMS' application). The number of displays will be limited to not more

than 20 total events per year within these four specific areas combined, along the whole 276 mi (444 km) of coastline. The display areas were described in detail in the Federal Register document announcing the proposed rule (77 FR 19976; April 3, 2012); please see that document for more information.

Comments and Responses

NMFS published the proposed rule in the Federal Register on April 3, 2012 (77 FR 19976). During the 30-day comment period, NMFS received a letter from the Marine Mammal Commission (MMC). The MMC recommended that NMFS issue the final rule but condition it to require the MBNMS to conduct monitoring for at least 30 minutes on the evening of each fireworks display and the morning after each display. The MMC believes that monitoring (1) is essential to estimating the number of actual takes and to document any injuries or deaths and (2) should occur as close to the fireworks detonation time as possible. The proposed rule did not specify a minimum time for pre- or post-event monitoring. NMFS concurs with the recommendation and will stipulate that pre-event monitoring shall take place on the day prior to the scheduled display for as long as is required (but for no less than 30 minutes) to record the presence of marine mammals in the vicinity of the display, and that post-event monitoring for dead or injured marine mammals shall occur the morning following the display for as long as is required (but for no less than 30 minutes) to investigate the vicinity of the display. No other public comments were received. All measures proposed in the initial Federal Register document are included within the authorization and NMFS has determined that they will effect the least practicable impact on the species or stocks and their habitats.

Description of Marine Mammals in the Area of the Specified Activity

There are 26 known species of marine mammals within the Monterey Bay area. However, only six of these species are likely to be present in the acute impact area (the area where sound, light, and debris effects may have direct impacts on marine organisms and habitats) during a fireworks display. These species include the California sea lion, harbor seal, southern sea otter (Enhydra lutris), bottlenose dolphin (Tursiops truncatus), harbor porpoise (Phocoena phocoena), and gray whale. The northern elephant seal is rarely seen in the area.

Though the three aforementioned cetaceans are known to frequent nearshore areas within the sanctuary, they have never been reported in the vicinity of a fireworks display, nor have there been any reports to the MBNMS of stranding events or of injured/dead animals discovered after any display. Because sound attenuates rapidly across the air-water interface, these animals would likely not encounter the effects of fireworks except when surfacing for air. NMFS does not anticipate any take of cetaceans and they are not addressed further in this document.

Past sanctuary observations have not detected any disturbance to sea otters as a result of the fireworks displays; however, past observations have not included specific surveys for this species. Sea otters do frequent all general display areas. Sea otters and other species may temporarily depart the area prior to the beginning of the fireworks display due to increased human activities. Some sea otters in Monterey harbor have become well-acclimated to very intense human activity, often continuing to feed undisturbed as boats pass simultaneously on either side and within 20 ft (6 m) of the otters. It is therefore possible that select individual otters may have a higher tolerance level than others to fireworks displays. Otters in residence within the Monterey harbor display a greater tolerance for intensive human activity than their counterparts in more remote locations. However, otters are not under NMFS' jurisdiction. The MBNMS consulted with the U.S. Fish and Wildlife Service (USFWS) pursuant to section 7 of

the Endangered Species Act (ESA) regarding effects on southern sea otters. The USFWS issued a biological opinion on June 22, 2005, which concluded that the authorization of fireworks displays is not likely to jeopardize the continued existence of endangered and threatened species within the sanctuary or to destroy or adversely modify any listed critical habitat. The USFWS further found that MBNMS would be unlikely to take any southern sea otters, and therefore issued neither an incidental take statement under the ESA nor an IHA.

The northern elephant seal is seen so infrequently in the areas with fireworks displays that they are not likely to be impacted by fireworks displays. Therefore, the only species likely to be harassed by the fireworks displays are the California sea lion and the harbor seal. Detailed species accounts of the California sea lion and harbor seal were provided in the Federal Register notice announcing the proposed rule (77 FR 19976; April 3, 2012); please see that document for more information.

Potential Effects of the Specified Activity on Marine Mammals

The potential effects of the specified activity, including physiological effects, behavioral disturbance, the effects of sound and light, and increased boat traffic, were described in detail in the Federal Register notice announcing the proposed rule (77 FR 19976; April 3, 2012); please see that document for more information.

Anticipated Effects on Habitat

The anticipated effects of the specified activity on marine mammal habitat, including those from fireworks debris and chemical residue, were described in detail in the Federal Register document announcing the proposed rule (77 FR 19976; April 3, 2012); please see that document for more information.

Summary of Previous Monitoring

The MBNMS has monitored commercial fireworks displays for potential impacts to marine life and habitats since 1993. In July 1993, the MBNMS performed its initial field observations of professional fireworks at the annual Independence Day fireworks display conducted by the City of Monterey. Subsequent documented field observations were conducted in Monterey by the MBNMS staff on seven occasions between 1994 and 2002. Documented field observations were also made at Aptos each October from 2000 to 2005, and have been made for all authorized fireworks under NMFS-issued MMPA authorizations, beginning in 2005. Though monitoring techniques and intensity have varied over the years and visual monitoring of wildlife abundance and behavioral responses to nighttime displays is challenging, observed impacts have been consistent. Wildlife activity nearest to disturbance areas returns to normal (pre-display species distribution, abundance, and activity patterns) within 12-15 hours, and no signs of wildlife injury or mortality have ever been discovered as a result of managed fireworks displays.

Sea lions are generally more tolerant of noise and visual disturbances than harbor seals. In addition, pups and juveniles of either species are more likely to be harassed when exposed to disturbance than are older animals. Adult sea lions have likely habituated to many sources of disturbance and are therefore much more tolerant of human activities nearby. Of all the display sites in the sanctuary, California sea lions are only present in significant concentrations at Monterey. Nearly two decades of observing sea lions at the City of Monterey's Fourth of July celebration provides the following general observations: sea lions (1) begin leaving the breakwater as soon as the fireworks begin; (2) clear completely off after an aerial salute or quick succession of loud effects; (3) usually begin returning within a few hours of the end of the

display; and (4) are present on the breakwater at pre-firework numbers by the following morning.

The same surveys have noted that the small numbers of harbor seals that are typically present usually do not haul out after the initial fireworks detonation, but remain in the water around the haul-out. The observed behavior of the seals after the initial disturbance and during the fireworks display is similar to responses observed during rocket launches at Vandenberg Air Force Base (VAFB), where harbor seals loitered in the water adjacent to their haul-out site during the launch and returned to shore within 2 to 22 minutes after the launch disturbance.

A private environmental consultant monitored the Aptos fireworks display each October from 2001 through 2005 (per California Coastal Commission permit conditions) and concluded that harbor seal activity returned to normal at the site by the day following the display. Surveys have detected no evidence of injury or mortality in harbor seals as a result of the annual 30-minute fireworks display at the site.

Since harbor seals are smaller than sea lions and are less vocal, their movements and behavior are often more difficult to observe at night. In general, harbor seals are more timid and easily disturbed than California sea lions. Thus, based on past observations of sea lion disturbance thresholds and behavior, it is very likely that harbor seals evacuate exposed haul-outs in the acute impact area during fireworks displays, though they may loiter in adjacent surface waters until the fireworks have concluded. In conclusion, fireworks displays likely result in temporary displacement from haul-outs, constituting a short-term disruption in behavior, and pinnipeds are likely to resume normal behavior and full utilization of haul-outs within approximately 12 hours.

In 2007, MBNMS conducted acoustic monitoring in conjunction with in-depth behavioral monitoring for the City of Monterey Independence Day fireworks display. MBNMS was required to: (1) conduct counts of marine mammals present within the fireworks impact area immediately before and one day after the event; (2) conduct behavioral observations of marine mammals present during the display; and (3) conduct NMFS-approved acoustic monitoring of sound levels for the duration of the event. The full report (Marine Mammal Acoustic and Behavioral Monitoring for the Monterey Bay National Marine Sanctuary Fireworks Display 4 July 2007) is available at <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>.

Acoustic monitoring began approximately 3 hours prior to the beginning of the fireworks display. During those 3 hours, the average 1-hour sound level (L_{eq} 1 hour) was approximately 59 dB, and included sea lion vocalizations, private fireworks in the local area, and recreational boat traffic. The fireworks display began with two sets of fireworks detonations and ended with a grand finale of multiple explosions after 20 minutes. The average sound level measured during the hour containing the fireworks display was 72.9 dB, approximately 14 dB greater than ambient levels recorded before the display. The loudest sound recorded during the event was associated with the detonation of a 10-in shell, and was measured at 133.9 dB re: 20 μ Pa (peak). The second loudest sound recorded was associated with detonation of an 8-in shell, measured at 127 dB re: 20 μ Pa (peak). Overall, sound generated during the display was low- to mid-frequency and ranged from 97 to 107 dB re: 20 μ Pa, while the majority of the fireworks detonations ranged from 112 to 124 dB re: 20 μ Pa.

From 2006-2011, under the regulations in effect from July 4, 2006, through July 3, 2011 (71 FR 40928; July 19, 2006), and a subsequent 1-year IHA, 24 fireworks events were authorized in the MBNMS. For each display, observers conducted a pre-event census to

document abundance of marine mammals and post-event surveys to record any injured or dead wildlife species. Pre-event censuses were assumed to be a reasonable proxy for the number of incidental takes, as all animals present within the vicinity of the display area would be expected to temporarily abandon haul-outs prior to or during fireworks displays. Table 1 summarizes these monitoring efforts. In all cases, no pinnipeds other than those authorized for taking were observed, and post-event monitoring revealed no injured or dead marine mammals.

Table 1. Incidental take of marine mammals during MBNMS-authorized fireworks displays, 2006-2011

Event	Location	Date	California sea lions	Harbor seals
Independence Day	Cambria	7/4/2006	0	0
Independence Day	Monterey	7/4/2006	61	9
Feast of Lanterns	Pacific Grove	7/30/2006	0	0
Monte Foundation	Aptos	10/14/2006	0	4
Independence Day	Cambria	7/4/2007	0	0
Independence Day	Monterey	7/4/2007	258	8
Independence Day	Half Moon Bay	7/4/2007	0	1
Feast of Lanterns	Pacific Grove	7/28/2007	0	8
Monte Foundation	Aptos	10/13/2007	0	4
Independence Day	Cambria	7/4/2008	0	0
Independence Day	Monterey	7/4/2008	394	10
Independence Day	Half Moon Bay	7/4/2008	0	2
Feast of Lanterns	Pacific Grove	7/26/2008	0	0
Monte Foundation	Aptos	10/11/2008	24	2
Independence Day	Cambria	7/4/2009	0	0
Independence Day	Half Moon Bay	7/4/2009	45	5
Feast of Lanterns	Pacific Grove	7/25/2009	4	7
Monte Foundation	Aptos	10/3/2009	35	11
Independence Day	Cambria	7/4/2010	0	0
Monte Foundation	Aptos	10/8/2010	0	18
Independence Day	Cambria	7/4/2011	0	0
Independence Day	Half Moon Bay	7/4/2011	0	0
Feast of Lanterns	Pacific Grove	7/30/2011	0	2
Monte Foundation	Aptos	10/7/2011	0	0
Total	-	-	821	91

Mitigation

In order to issue an incidental take authorization under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the specified activity, and other means of effecting the least practicable impact on each species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of each species or stock for taking for certain subsistence

uses (where relevant). The MBNMS and NMFS worked to craft a set of mitigation measures designed to minimize fireworks impacts on the marine environment, as well as to outline the locations, frequency, and conditions under which the MBNMS will authorize marine fireworks displays. These mitigation measures, which were successfully implemented under NMFS-issued ITAs from 2005-2011, include four broad approaches for managing fireworks displays:

- Establish a sanctuary-wide seasonal prohibition to safeguard pinniped reproductive periods. Fireworks events will not be authorized between March 1 and June 30 of any year, i.e., the primary reproductive season for pinnipeds.
- Establish four conditional display areas and prohibit displays along the remaining 95 percent of sanctuary coastal areas. Traditional display areas are located adjacent to urban centers where wildlife has often become habituated to frequent human disturbances. Remote areas and areas where professional fireworks have not traditionally been conducted will not be considered for fireworks approval. The conditional display areas (described previously in this document) are located at Half Moon Bay, the Santa Cruz/Soquel area, the northeastern Monterey Peninsula, and Cambria (Santa Rosa Creek).
- Create a per-annum limit on the number of displays allowed in each display area. If properly managed, a limited number of fireworks displays conducted in areas already heavily impacted by human activity can occur with sufficient safeguards to prevent any long-term or chronic impacts upon local natural resources. There is a per-annum limit of 20 displays along the entire sanctuary coastline in order to prevent cumulative negative environmental effects from fireworks proliferation. Additionally, displays will be authorized at a frequency equal to or less than one every 2 months in each area.

- Retain authorization requirements and general and special restrictions for each event. Fireworks displays will not exceed 30 minutes with the exception of two longer displays per year that will not exceed 1 hour. Standard requirements include the use of a ramp-up period, wherein salutes are not allowed in the first 5 minutes of the display; the removal of plastic and aluminum labels and wrappings; and post-show reporting and cleanup. The sanctuary will continue to assess displays and restrict the number of aerial salute effects on a case-by-case basis, and will implement general and special restrictions unique to each fireworks event as necessary.

These measures are designed to prevent an incremental proliferation of fireworks displays and disturbance throughout the sanctuary and minimize area of impact by confining displays to primary traditional use areas. They also effectively remove fireworks impacts from 95 percent of the sanctuary's coastal areas, place an annual quota and multiple conditions on the displays authorized within the remaining 5 percent of the coast, and impose a sanctuary-wide seasonal prohibition on all fireworks displays. These measures were developed in order to assure that protected species and habitats are not jeopardized by fireworks activities. They have been well received by local fireworks sponsors who have pledged their cooperation in protecting sanctuary resources.

NMFS has carefully evaluated the applicant's mitigation measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) the manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals; (2) the proven or likely efficacy of

the specific measure to minimize adverse impacts as planned; and (3) the practicability of the measure for applicant implementation.

Based on our evaluation of the applicant's measures and their efficacy over the past 6 years of authorizing fireworks, NMFS has determined that these mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an ITA for an activity, section 101 (a)(5)(A) of the MMPA states that NMFS must, where applicable, set forth "requirements pertaining to the monitoring and reporting of such taking". The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

In order to increase the long-term understanding of the effects of fireworks displays on pinnipeds, described previously in Summary of Previous Monitoring, as well as to estimate levels of incidental take and ensure compliance with MMPA authorizations, MBNMS will require its applicants to conduct a pre-event census of local marine mammal populations within the acute fireworks impact area. Each applicant will also be required to conduct post-event monitoring in the acute fireworks impact area to record injured or dead marine mammals. The pre-event census shall occur no earlier than the day prior to the fireworks display, and observations will be conducted for no less than 30 minutes. The post-event monitoring shall take

place no later than the morning following the display, and will be conducted for no less than 30 minutes.

MBNMS must submit a draft annual monitoring report to NMFS within 60 days after the conclusion of the calendar year. MBNMS must submit a final annual monitoring report to the NMFS within 30 days after receiving comments from NMFS on the draft report. If no comments are received from NMFS, the draft report will be considered to be the final report. In addition, the MBNMS will continue to make its information available to other marine mammal researchers upon request.

Adaptive Management

This final rule governing the take of marine mammals incidental to the specified activities at MBNMS contains an adaptive management component. In accordance with 50 CFR 216.105(c), these regulations are based on the best available information. As new information is developed, through monitoring, reporting, or research, the regulations may be modified, in whole or in part, after notice and opportunity for public review. The use of adaptive management will allow NMFS to consider new information from different sources to determine if mitigation or monitoring measures should be modified (including additions or deletions) if new data suggest that such modifications are appropriate.

The following are some of the possible sources of applicable data:

- Results from MBNMS's monitoring from the previous year;
- Results from general marine mammal research; or
- Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

If, during the effective dates of the regulations, new information is presented from monitoring, reporting, or research, these regulations may be modified, in whole or in part, after notice and opportunity of public review, as allowed for in 50 CFR 216.105(c). In addition, LOAs will be withdrawn or suspended if, after notice and opportunity for public comment, the Assistant Administrator finds, among other things, that the regulations are not being substantially complied with or that the taking allowed is having more than a negligible impact on the species or stock, as allowed for in 50 CFR 216.106(e). That is, should substantial changes in marine mammal populations in the project area occur or monitoring and reporting show that MBNMS actions are having more than a negligible impact on marine mammals, then NMFS reserves the right to modify the regulations and/or withdraw or suspend the LOA after public review.

Estimated Take by Incidental Harassment

With respect to the activities described here, the MMPA defines ‘harassment’ as: “any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].”

All anticipated takes would be by Level B harassment, involving temporary changes in behavior. The mitigation and monitoring measures are expected to minimize the possibility of injurious or lethal takes such that take by Level A harassment, serious injury or mortality, is considered remote. However, there is no specific information demonstrating that injurious or lethal takes would occur even in the absence of the planned mitigation and monitoring measures.

The two marine mammal species likely to be taken by Level B harassment incidental to fireworks displays authorized within the sanctuary are the California sea lion and the harbor seal, due to the temporary evacuation of usual and accustomed haul-out sites. Both of these species are protected under the MMPA, while neither is listed under the ESA. Numbers of animals that may be taken by Level B harassment are expected to vary due to factors such as tidal state, seasonality, shifting prey stocks, climatic phenomenon (such as El Niño events), and the number, timing, and location of future displays. The estimated take of sea lions and harbor seals was determined using the monitoring data from 2006-2011, presented earlier in this document, except as described in the footnotes to Table 2. Numbers of animals that are likely to be present were analyzed for the four prescribed areas described previously in this document: Half Moon Bay (HMB), Santa Cruz/Soquel (SC; including Capitola and Aptos), Monterey Bay (MB; including Pacific Grove), and Cambria (C). Please see Table 2 for more information. Table 2 of NMFS' proposed rule (77 FR 19976; April 3, 2012) contained several errors; those errors are corrected here.

Table 2. Estimated Potential Incidental Take per Year by Display Area

Display Location	Time of Year	Estimated maximum number of events per year	Estimated maximum number of animals present per event (total)	
			California sea lions	Harbor seals
HMB	July	4	45 (180)	5 (20)
SC	October	5	35 (175)	18 (90)
MB	July	6	394 (2,364)	10 (60)
MB ¹	January	1	1500	60
Cambria ²	July	4	0	0
Total		20	4,219	230

¹ From 2006-11, no authorized fireworks events occurred at MB during January. However, authorized events have occurred at MB in January and could occur again during the life of this rule. Given the lack of monitoring data available, potential take is conservatively estimated for such an event on the basis of unpublished data gathered by MBNMS biologists at the specific display site, unpublished aerial survey data gathered by NMFS from Point Piedras Blancas to Bodega Rock, results of independent surveys conducted in the MBNMS and personal communication with those researchers, and population estimates from surveys covering larger geographic areas.

² From 2006-11, no pinnipeds have been observed during monitoring associated with authorized fireworks displays at Cambria.

At all four designated display sites combined, twenty fireworks events per year could likely disturb an estimated maximum total of 4,219 California sea lions out of a total estimated population of 238,000. This number is small relative to the population size (1.8 percent). For harbor seals, an estimated maximum of 230 animals out of a total estimated population of 34,233 could be disturbed within the sanctuary as a result of twenty fireworks events per year at all four designated display sites combined. These numbers are small relative to the population size (0.7 percent).

With the incorporation of mitigation measures described previously in this document, only Level B incidental harassment associated with authorized coastal fireworks displays is likely to occur, and these events are unlikely to result in any detectable impact on marine mammal species or stocks or their habitats.

Negligible Impact and Small Numbers Analysis and Determination

NMFS has defined 'negligible impact' in 50 CFR 216.103 as "...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) the number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the take occurs.

Past monitoring by the MBNMS has identified only a short-term behavioral disturbance of animals by fireworks displays, with the primary causes of disturbance being sound effects and light flashes from exploding fireworks. Additionally, a VAFB study of the effects of rocket-launch noise, which is more intense than fireworks noise, on California sea lions and harbor seals

indicated only short-term behavioral impacts. With the mitigation measures described herein, any takes would be limited to the temporary incidental harassment of California sea lions and harbor seals due to evacuation of usual and accustomed haul-out sites for as little as 15 minutes and as much as 15 hours following any fireworks event. Most animals depart affected haul-out areas at the beginning of the display and return to previous levels of abundance within 4 to 15 hours following the event. This information is based on observations made by sanctuary staff over an 8-year period (1993-2001), in-depth surveys conducted in 2001 and 2007, and pre- and post-event monitoring conducted under MMPA authorizations from 2005-2011. Empirical observations have focused on impacts to water quality and selected marine mammals in the vicinity of the displays.

NMFS has determined that the fireworks displays will result in no more than Level B harassment of small numbers of California sea lions and harbor seals. The effects of coastal fireworks displays are typically limited to short term and localized changes in behavior, including temporary departures from haul-outs to avoid the sight and sound of commercial fireworks. Fireworks displays are limited in duration by MBNMS authorization requirements and will not occur on consecutive days at any fireworks site in the sanctuary. MBNMS' mitigation measures – implemented as a component of NMFS' incidental take authorizations since 2005 – will further reduce potential impacts. As described previously, these measures ensure that authorized fireworks displays avoid times of importance for breeding, as well as limiting displays to the 5 percent of sanctuary coastline that is already heavily used by humans, and generally limiting the overall amount and intensity of activity. No take by injury, serious injury, or mortality is anticipated, and takes by Level B harassment will be at the lowest level

practicable due to incorporation of the mitigation measures described previously in this document.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that MBNMS' authorization of coastal fireworks displays will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from coastal fireworks displays will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action.

Endangered Species Act (ESA)

As mentioned earlier, the Steller sea lion and several species of ESA-listed cetaceans may be present at MBNMS at different times of the year and could potentially swim through the fireworks impact area during a display. In a 2001 consultation with MBNMS, NMFS concluded that this action is not likely to adversely affect ESA-listed species under NMFS' jurisdiction. There is no designated critical habitat in the area. This action will not have effects beyond those analyzed in that consultation.

The USFWS is responsible for regulating incidental take of the southern sea otter. The MBNMS consulted with the USFWS pursuant to section 7 of the ESA regarding impacts to that species. The USFWS issued a biological opinion on June 22, 2005, which concluded that the authorization of fireworks displays is not likely to jeopardize the continued existence of endangered and threatened species within the sanctuary or to destroy or adversely modify any listed critical habitat. The USFWS further found that MBNMS would be unlikely to take any

southern sea otters, and therefore issued neither an incidental take statement under the ESA nor an IHA.

National Environmental Policy Act

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), as implemented by the regulations published by the Council on Environmental Quality (40 CFR parts 1500-1508), and NOAA Administrative Order 216-6, NMFS and MBNMS prepared an Environmental Assessment (EA) on the Issuance of Regulations Authorizing Incidental Take of Marine Mammals and Issuance of National Marine Sanctuary Authorizations for Coastal Commercial Fireworks Displays within the Monterey Bay National Marine Sanctuary, to consider the direct, indirect and cumulative effects to the human environment resulting from issuance of sanctuary authorizations for fireworks displays and issuance of an IHA to MBNMS. NMFS signed a Finding of No Significant Impact (FONSI) on June 21, 2006. NMFS has reviewed MBNMS's application and determined that there are no substantial changes to the action, no significant new information, and that there are no new direct, indirect, or cumulative effects to the human environment resulting from issuance of an IHA to MBNMS. Therefore, NMFS has determined that a new or supplemental EA or Environmental Impact Statement is unnecessary, and reaffirms the existing FONSI for this action. The existing EA and FONSI for this action are available for review at <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>.

Classification

The Office of Management and Budget (OMB) has determined that this rule is not significant for purposes of Executive Order 12866.

At the proposed rule stage, the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration

that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. MBNMS is a component of the Office of National Marine Sanctuaries within NOAA, which is a federal agency. Because this rule impacts only the activities of MBNMS, which is not considered to be a small entity within SBA's definition, the Chief Counsel for Regulation certified that this rule will not have a significant economic impact on a substantial number of small entities. No comments were received on this certification. As a result, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. This rule contains collection-of-information requirements subject to the provisions of the PRA. These requirements have been approved by OMB under control number 0648-0151 and include applications for regulations, subsequent LOAs, and reports. Send comments regarding any aspect of this data collection, including suggestions for reducing the burden, to NMFS and the OMB Desk Officer (see ADDRESSES).

List of Subjects in 50 CFR part 217

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: May 16, 2012.

Alan D. Risenhoover,

Acting Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 217 is amended as follows:

PART 217--REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS
INCIDENTAL TO SPECIFIED ACTIVITIES

1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 et seq.

2. Subpart B is added to part 217 to read as follows:

Subpart B--Taking of Marine Mammals Incidental to Coastal Commercial Fireworks Displays at
Monterey Bay National Marine Sanctuary, CA

Sec.

217.11 Specified activity and specified geographical region.

217.12 Effective dates.

217.13 Permissible methods of taking.

217.14 Prohibitions.

217.15 Mitigation.

217.16 Requirements for monitoring and reporting.

217.17 Letters of Authorization.

217.18 Renewals and Modifications of Letters of Authorization.

Subpart B--Taking of Marine Mammals Incidental to Coastal Commercial Fireworks Displays at
Monterey Bay National Marine Sanctuary, CA

§ 217.11 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the Monterey Bay National Marine
Sanctuary (MBNMS) and those persons it authorizes to display fireworks within the MBNMS
for the taking of marine mammals that occurs in the area described in paragraph (b) of this
section and that occurs incidental to authorization of commercial fireworks displays.

(b) The taking of marine mammals by MBNMS may be authorized in a Letter of Authorization (LOA) only if it occurs in waters of the MBNMS.

§ 217.12 Effective dates.

Regulations in this subpart are effective from June 28, 2012, through June 28, 2017.

§ 217.13 Permissible methods of taking.

(a) Under LOAs issued pursuant to §§ 216.106 and 217.17 of this chapter, the Holder of the LOA (hereinafter “MBNMS”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.11(b) of this chapter, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

(b) The incidental take of marine mammals under the activities identified in § 217.11(a) of this chapter is limited to the following species and is limited to Level B Harassment:

(1) Harbor seal (Phoca vitulina) – 1,150 (an average of 230 annually)

(2) California sea lion (Zalophus californianus) – 21,095 (an average of 4,219 annually)

§ 217.14 Prohibitions.

Notwithstanding takings contemplated in § 217.11 of this chapter and authorized by a LOA issued under §§ 216.106 and 217.17 of this chapter, no person in connection with the activities described in § 217.11 of this chapter may:

(a) Take any marine mammal not specified in § 217.13(b) of this chapter;

(b) Take any marine mammal specified in § 217.13(b) of this chapter other than by incidental, unintentional Level B harassment;

(c) Take a marine mammal specified in § 217.13(b) of this chapter if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under §§ 216.106 and 217.17 of this chapter.

§ 217.15 Mitigation.

(a) The activity identified in § 217.11(a) of this chapter must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitats. When conducting the activities identified in § 217.11(a) of this chapter, the mitigation measures contained in the LOA issued under §§ 216.106 and 217.17 of this chapter must be implemented. These mitigation measures include but are not limited to:

(1) Limiting the location of the authorized fireworks displays to the four specifically designated areas at Half Moon Bay, the Santa Cruz/Soquel area, the northeastern Monterey Breakwater, and Cambria (Santa Rosa Creek);

(2) Limiting the frequency of authorized fireworks displays to no more than twenty total displays per year and no more than one fireworks display every 2 months in each of the four prescribed areas;

(3) Limiting the duration of authorized individual fireworks displays to no longer than 30 minutes each, with the exception of two longer shows not to exceed 1 hour;

(4) Prohibiting fireworks displays at MBNMS between March 1 and June 30 of any year; and

(5) Continuing to implement authorization requirements and general and special restrictions for each event, as determined by MBNMS. Standard requirements include, but are not limited to, the use of a ramp-up period, wherein salutes are not allowed in the first 5 minutes of the display; the removal of plastic and aluminum labels and wrappings; and post-show reporting and cleanup. MBNMS shall continue to assess displays and restrict the number of

aerial salute effects on a case-by-case basis, and shall implement general and special restrictions unique to each fireworks event as necessary.

(b) The mitigation measures that the individuals conducting the fireworks are responsible for will be included as a requirement in fireworks display authorizations issued by MBNMS to the individual entities.

§ 217.16 Requirements for monitoring and reporting.

(a) MBNMS is responsible for ensuring that all monitoring required under a LOA is conducted appropriately, including, but not limited to:

(1) A census of all pinnipeds in the impact area on the day prior to all displays, with observations to occur for no less than 30 minutes, and

(2) Reporting to NMFS of all marine mammal injury, serious injury, or mortality observed in the vicinity of the display area. Monitoring for injury, serious injury, or mortality shall occur no later than the morning after each fireworks display, and shall occur for no less than 30 minutes.

(b) Unless specified otherwise in the LOA, MBNMS must submit a draft annual monitoring report to the Director, Office of Protected Resources, NMFS, no later than 60 days after the conclusion of each calendar year. This report must contain:

(1) An estimate of the number of marine mammals disturbed by the authorized activities,

(2) Results of the monitoring required in § 217.16(a) of this chapter, and any additional information required by the LOA. A final annual monitoring report must be submitted to NMFS within 30 days after receiving comments from NMFS on the draft report. If no comments are received from NMFS, the draft report will be considered to be the final annual monitoring report.

(c) A draft comprehensive monitoring report on all marine mammal monitoring conducted during the period of these regulations must be submitted to the Director, Office of Protected Resources, NMFS at least 120 days prior to expiration of these regulations. A final comprehensive monitoring report must be submitted to the NMFS within 30 days after receiving comments from NMFS on the draft report. If no comments are received from NMFS, the draft report will be considered to be the final comprehensive monitoring report.

§ 217.17 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, MBNMS must apply for and obtain a LOA.

(b) A LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, MBNMS must apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, MBNMS must apply for and obtain a modification of the LOA as described in § 217.18 of this chapter.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (i.e., mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of a LOA shall be published in the Federal Register within 30 days of a determination.

§ 217.18 Renewals and modifications of Letters of Authorization.

(a) A LOA issued under §§ 216.106 and 217.17 of this chapter for the activity identified in § 217.11(a) of this chapter shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in § 217.18(c)(1) of this chapter), and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in § 217.18(c)(1) of this chapter) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the Federal Register, including the associated analysis illustrating the change, and solicit public comment before issuing the LOA .

(c) A LOA issued under §§ 217.106 and 217.17 of this chapter for the activity identified in § 217.11(a) of this chapter may be modified by NMFS under the following circumstances:

(1) Adaptive Management – NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with MBNMS regarding the

practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from MBNMS's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the Federal Register and solicit public comment.

(2) Emergencies - If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.13(b) of this chapter, an LOA may be modified without prior notice or opportunity for public comment. Notification would be published in the Federal Register within 30 days of the action.

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